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10 *Attorneys for Plaintiffs*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

12 **IN THE ARIZONA TAX COURT**

13 SUSAN MORAN and JOHN UDALL,
14 individually and as representatives of the class
15 comprised of federal employees who paid
16 Arizona income taxes on federal retirement
contributions during one or more of the years
1985 to date,

17 Plaintiffs,

18 v.

19 GALE L. GARRIOTT, in his capacity as
20 Director of the Arizona Department of
Revenue, the ARIZONA DEPARTMENT OF
REVENUE of the State of Arizona,

21 Defendants.

22 SUSAN MORAN and JOHN UDALL AND
23 THEIR ATTORNEYS, BONN & WILKINS,
24 CHARTERED and O'NEIL, CANNON,
HOLLMAN, DE JONG, S.C.,

25 Counterclaimants,

26 v.

27 STATE OF ARIZONA, ex rel., the ARIZONA
DEPARTMENT OF REVENUE,

28 Counterdefendants.

No. TX 97-00119
No. TX 97-00131
No. TX 97-00150
(Consolidated)

**PLAINTIFFS' MOTION FOR THE
PRELIMINARY APPROVAL OF A
STIPULATION OF SETTLEMENT AND
ORDER REGARDING NOTICE**

(Assigned to the Hon. Mark W. Armstrong)

1
2 The Plaintiffs hereby move this Court for its Order pursuant to Ariz. R. Civ. P. 7.1
3 and the due process clauses of the United States and Arizona Constitutions, preliminarily
4 approving the Stipulation of Settlement (the "Settlement") dated April 19, 2006, which is
5 attached hereto as Exhibit "A".¹ Upon preliminary approval of the Settlement, the Plaintiffs
6 request that the Court enter an Order for such other findings and such other relief concerning
7 the matter set forth in the "Proposed Preliminary Findings and Interim Order" which is
8 attached hereto as Exhibit "B".

9 In that regard, as a result of the Settlement, and as a result of Plaintiffs' Counsels'
10 separate Application For Award Of Attorneys' Fees, the Plaintiffs also request that the Court
11 approve the Parties' stipulated Plan of Notice so that notice can be provided to the over 40,000
12 individual Claimants who may be common fund beneficiaries under the Settlement, affording
13 them notice of the Settlement and the Claimants' rights to be heard and to object concerning
14 the Settlement and Plaintiffs' Counsel's application for a fee award consistent with the
15 provisions of the June 17, 1998 Judgment (The "1998 Judgment").

16 The preliminary approval of the Settlement contemplated hereby will be subject to a
17 further and final hearing before the Court, which shall be for the purpose of making final such
18 preliminary findings and making such other findings and granting such other relief, concerning
19 such matters, as stated in the attached Proposed Preliminary Findings and Interim Order. The
20 date of such final hearing shall be finally set at the hearing on this Motion, but the parties have
21 agreed to schedule a date that is not less than 8 (eight) weeks after the Court preliminarily
22 approves the Settlement.

23 To implement this process, it is contemplated that notice of the proposed Settlement,
24 in all its particulars, shall be communicated to the Claimants specified in the Settlement,
25 following the preliminary approval of the same by the Court, in the manner provided in the
26 attached Proposed Preliminary Findings and Interim Order, or, in such other manner as the

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28 ¹ For clarity and ease of reference, all defined terms referenced herein shall have the same meaning as set
forth in the Settlement, Exhibit "A" hereto.

1 Court may establish at the hearing on this Motion.

2 This Motion is supported by the following Memorandum of Points and Authorities,
3 the Declaration of Randall D. Wilkins, Esq. attached hereto, and by the Court's entire file
4 herein.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. BACKGROUND OF THIS ACTION.**

7 This refund action was commenced with the Arizona Department of Revenue (the
8 "Department") in 1989 and sought the recovery of Arizona income taxes paid by federal
9 employees on mandatory contributions to federal retirement programs.

10 The procedural and substantive history of this case is the subject of seven published
11 decisions, including one by this Court, 191 Ariz. 293, 955 P.2d 49 (Az. Tax Ct. 1998), five by
12 the Court of Appeals, which are reported at 183 Ariz. 1, 899 P.2d 162 (App. 1994), 185 Ariz.
13 457, 916 P.2d 1173 (App. 1996); 197 Ariz. 213, 3 P.3d 1133 (App. 2000); 201 Ariz. 125, 32
14 P.3d 408 (App. 2001), 204 Ariz. 485, 65 P.3d 434 (App. 2003), and one by the Supreme Court
15 of Arizona, 207 Ariz. 181, 84 P.3d 446, *cert. denied sub. nom. Moran v. Hibbs*, 543 U.S. 810
16 (2004). The case is now back before this Court on remand from the Supreme Court of Arizona
17 to address Plaintiffs' claims that additional refunds are due Claimants for one or more of the
18 years 1985 to and including 1990. In this respect, currently pending before the Court is
19 Plaintiffs' Motion to Enforce the June 17, 1998 Judgment concerning timely filed individual
20 refund Claims.

21 This Motion has been stayed while the parties engaged in extensive settlement
22 negotiations. With the assistance of Mediator Bruce Meyerson, the parties have reached the
23 Settlement, which they believe benefits the Plaintiffs, the Claimants and the Department.

24 **II. APPROVAL AND OPPORTUNITY TO BE HEARD.**

25 The Settlement represents a compromise of disputed Claims, including the pending
26 Motion to enforce the 1998 Judgment, which results in a monetary fund for the benefit of
27 Claimants who meet the eligibility requirements for a refund under the Settlement. In the
28 landmark case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the

1 United States Supreme Court established the constitutional requirements of notice that must be
2 satisfied by a trustee seeking judicial approval of a final settlement of accounts of beneficiaries
3 in a common trust fund. In *Mullane*, the Court ruled that an adjudication of a beneficiary's
4 rights must be "preceded by notice and opportunity for hearing appropriate to the nature of the
5 case." *Id.* at 313. The Court further observed that:

6 An elementary and fundamental requirement of due process in
7 any proceeding which is to be accorded finality is notice
8 reasonably calculated, under all the circumstances, to apprise
 interested parties of the pendency of the action and afford them
 an opportunity to present their objections.

9 *Id.* at 314.

10 The Settlement in this case finally resolves all previously undecided issues in the
11 case. These issues include reaching a compromise date on the issue of tolling and the pending
12 Motion to enforce the 1998 Judgment. As a result of the Settlement, approximately 40,000
13 individual Claimants will have their Claims reviewed to determine if they are eligible for a
14 further refund for tax years 1985 through 1990. In addition, under the Settlement, those
15 Claimants who do not receive refunds, have preserved their existing rights (including their
16 rights to appeal individually any adverse determination by the Department.)

17 In prior proceedings, it has been finally determined that the 1998 Judgment
18 established that this Litigation is a common fund case and that the total refunds and interest
19 paid by the Department constitute the common fund. *Kerr v. Killian*, 191 Ariz. 293, 955 P.2d
20 49 (Ariz. Tax Ct. 1998), *aff'd*, 197 Ariz. 213, 3 P.3d 1133 (App. 2000). Because the parties
21 seek a final resolution of the beneficiaries' rights in the fund, the Settlement is subject to
22 *Mullane*.²

23 **III. LEGAL STANDARD—THE COURT SHOULD APPROVE A SETTLEMENT IF IT IS FAIR,**
24 **REASONABLE, ADEQUATE AND IN THE BEST INTERESTS OF THE CLASS.**

25 In view of the due process requirements discussed above, Plaintiffs submit that the
26 legal standard for approving settlements in class actions under Rule 23 by analogy is an
27 appropriate guide for the Court in deciding this motion. The United States Supreme Court has

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² This Court followed *Mullane* in ordering notice and a hearing in 1998.

1 ruled that a state court proceeding applying a state statute which follows the notice procedures
2 for class actions under Fed. R. Civ. P. 23 satisfies *Mullane's* mandate for due process. See
3 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The procedures agreed to by the parties
4 follow the due process procedures of Ariz. R. Civ. P. 23 and *Mullane*.

5 Arizona Rule of Civil Procedure 23(e) provides that:

6 A class action shall not be dismissed or compromised without
7 the approval of the court, and notice of the proposed dismissal
8 or compromise shall be given to all members of the class in a
manner as the court directs.

9 There does not appear to be a single published Arizona case interpreting this Rule. However,
10 Arizona's version of Rule 23(e) is identical to the provisions of former Rule 23(e) of the
11 Federal Rules of Civil Procedure (and is substantially identical to the provisions of the current
12 federal rule), from which it was copied (formerly Fed. R. Civ. P. 23(c)). The State Bar
13 Committee Note to the 1966 Amendment to Rule 23 states "[t]he official comment of the
14 federal advisory committee on civil rules on the change in Federal Rule 23 is comprehensive
15 and should be consulted." Thus, federal cases interpreting Federal Rule 23(e) are helpful.

16 Rule 23(e) has been interpreted to require the trial court to determine whether a
17 proposed settlement is fundamentally fair, adequate, and reasonable. *Hanton v. Chrysler*
18 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The determination of the fairness of a class action
19 settlement is left to the sound discretion of the trial court. The Court of Appeals for the Ninth
20 Circuit held that it "conducts a 'very limited' review and 'will reverse only upon a strong
21 showing that the District Court's decision was a clear abuse of discretion.'" *Linney v. Cellular*
22 *Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (citing *Class Plaintiffs v. City of Seattle*,
23 955 F.2d 1268, 1276 (9th Cir. 1992)). "This is especially true in light of the strong judicial
24 policy that favors settlements, particularly where complex class action litigation is concerned."
25 *Id.*; see also *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal Courts naturally favor
26 the settlement of class action litigation."); *Hispanics United of DuPage County v. Village of*
27 *Addison, Ill.*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997) ("Compromise is particularly
28 appropriate in complex class actions."). In determining whether a settlement, taken as a whole,

1 is fair, reasonable and adequate to all concerned, courts consider that "[p]arties represented by
2 competent counsel are better positioned than courts to produce a settlement that fairly reflects
3 each party's expected outcome in litigation." *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 378
4 (9th Cir. 1995).

5 In assessing a settlement proposal, a lower court must balance a number of factors to
6 determine whether the settlement is fair, adequate, and reasonable. "A number of factors
7 [include]: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration
8 of further litigation; the risk of maintaining a class action status throughout the trial; the
9 amount offered in settlement; the extent of discovery completed and the stage of the
10 proceedings; the experience and views of counsel; ... and the reaction of the class members to
11 the proposed settlement." *In re Mega Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)
12 (citing *Hanlon*, 150 F.3d at 1026 (citations omitted)).

13 Measured against these standards, the parties' Settlement is manifestly "fair,"
14 "reasonable" and "adequate" and should be approved.

15 **IV. THE EVIDENCE ESTABLISHES THE SETTLEMENT IS FAIR, REASONABLE AND**
16 **ADEQUATE AND IS IN THE BEST INTERESTS OF THE CLASS.**

17 The fairness and reasonableness of the proposed Settlement is conclusively
18 established by the attached Declaration of Plaintiffs' Counsel, Randall D. Wilkins, attached
19 hereto as Exhibit "C". The Declaration establishes that the Settlement, which provides for a
20 procedure for the review and payment of eligible Claimants' Claims for individual refund
21 claims filed before July 9, 1998, and which further provides for recognition of administrative
22 appeal rights consistent with Arizona law for all Claimants who filed a Claim, will result in the
23 refund to the Claimants who are eligible under the Settlement of virtually all of the illegal taxes
24 together with the statutory interest. The Settlement should be preliminarily approved and
25 notice should be sent to the Claimants. Following notice and an opportunity to be heard, the
26 Court should enter a final order approving the Settlement.
27
28

1 V. CONCLUSION.

2 For all the reasons set forth herein, Plaintiffs request that this Court grant their
3 Motions for Preliminary Approval and Notice.

4 RESPECTFULLY SUBMITTED this 19th day of April, 2006.

5 BONN & WILKINS, CHARTERED S.C.
6 O'NEIL, CANNON, HOLLMAN, DEJONG S.C.

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By: Randall D. Wilkins
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D. Michael Hall, Esq.
Eugene O. Duffy, Esq.
William A. Wiseman, Esq.
Plaintiffs' Counsel

14 ORIGINAL filed and copy hand-delivered
15 this 19th day of April, 2006, to:

16 The Honorable Mark W. Armstrong
17 MARICOPA COUNTY SUPERIOR COURT
18 N.E. Regional Court
19 18380 North 40th Street
Phoenix, Arizona 85032

20 COPY of the foregoing mailed
21 this 19th day of April, 2006, to:

22 William A. Richards, Esq.
23 Senior Litigation Counsel
24 Civil Division
25 Office of the Attorney General
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26

27

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R. Wilkins